In The Supreme Court of the United States,

OCTOBER TERM, 1899.

APPEAL FROM THE

COURT OF PRIVATE LAND CLAIMS.

May Hays,
Appellant.
vs.
The United States,
Appellee.

This cause was commenced in the Court of Private Land Claims by May Hays, the appellant, for the confirmation of a grant of a tract of land situate in the County of San Miguel, Territory of New Mexico, known as the "Apache Springs," or "Ojo del Apache."

The petition for confirmation alleges that prior to July 2, 1842, Governor Manuel Armijo granted to Venturo Trujillo the tract of land known as Apache Spring (Ojo del Apache) and issued a decree to that effect directing the constitutional alcalde to place him in possession. That the said alcalde did so, and some time afterward returned that he had done so, and the original papers were duly deposited in the archives of New Mexico.

The petitioner further alleges that he has not the original or a copy of the petition of Trujillo, order or decree of the Governor and of the return made to the Governor by the alcalde, and that the same are not in the possession of the Surveyor General of New Mexico. That the archives of New Mexico, previous to the occupation by the United

States, and for some time thereafter, were kept very carelessly, and many of the papers and documents therein were lost and destroyed. The papers constituting said grant being among the number so lost and destroyed, and ask leave to give secondary evidence of the said petition, order and decree of said Governor, and the return of said Constitutional Alcalde. The petitioner also alleges that Damasio Salazar, a Justice of the Peace of the Demarcation of San Miguel del Bado (he was a Constitutional Alca'de) acting in conformity with the laws and customs then in force, placed Trujillo in possession of said tract of land called "Apache Springs" on July 2, 1842, described as follows: On the north a mesa, on the south the old road to Los Chupaines, on the east the Mesa de los Chupaines, and on the west the hills bordering on the Canoncito de la Lagunita.

That the original certificate of juridical possession, made by said alcalde, and which was given to said Trujillo, is now on file in the office of the Surveyor General of New Mexico, and that the copy thereof was returned by said alcalde with the original granting decree and has been lost with it.

That said Trujillo entered into possession of said tract of land so granted and occupied the same from about July 2, 1842, for about four years; that after him and claiming through him, his heirs and assigns, the property was occupied by Juan Lucero, Jesus Casados, John L. Taylor and the petitioner, May Hays, who by virtue of sundry and diverse mesne conveyances, now claims the ownership of the whole of said tract of land, and that ever since 1842, to the present time, the grantee, Trujillo, his legal representative and those claiming under him and them have held, claimed, used, occupied, owned and grazed upon the whole of said land peaceably and notoriously.

That said tract of land has not been surveyed, and the petitioner cannot state the amount thereof, but that it is not over eleven leagues.

That said Taylor, while he was the owner, made application to the Surveyor General for the approval of said grant, which was rejected December 19, 1872, and that on September 22, 1873, application was made to the Surveyor

General to reopen said application for confirmation, to receive new testimony which had been discovered in said cause. Said application was allowed so as to allow new testimony to be introduced, as shown by Exhibit F attached to the petition, and thereunder the testimony of Rafael Aragon, secretary of Damasio Salazar, the Constitutional Alcalde, who placed Trujillo in possession, and Guadalupe Miranda, Secretary of New Mexico during the administration of Manuel Armijo, was taken, which said testimony is a part of the evidence in this case, and is contained in the exhibit attached to the petition marked "A."

That both Rafael Aragon and Guadalupe Miranda are dead. That the said grant has always been claimed, occupied and held, since July, 1842, by said Venturo Trujillo, his heirs, grantees and assigns, and those claiming under them, as an individual grant made by the government of Mexico, and has been so generally recognized.

That the original documents by the Governor of New Mexico creating the grant are not now known to exist. That there are no gold or silver mines or lodes of mineral within the limits of the grant (page 1).

An amended petition was afterwards filed (page 11) containing substantially the same averments as to title and right, but making some additional parties defendants.

The United States answered, denying substantially the allegation of the first and fourth paragraphs of the petition, and alleging want of knowledge as to the remainder, asking for full proof as to the remainder of the allegations.

The cause was tried by the Court of Private Land Claims on the pleadings, evidence and stipulations contained in the record. The claim was rejected and the petition dismissed by a bare majority of the court. Justices Stone and Sluss dissenting from this decree. Hays appeaied.

POINTS INVOLVED IN THE CASE.

There are three points or questions to be considered in this case. First. Was there any grant made to the land in question by the proper authorities? Second. If said grant is not at present in existence, was it of record as a part of the archives, and has it been lost or destroyed? Third. Was the grant and tract of land under it occupied and held continuously and adversely by the grantee, his heirs and assigns, or as required by law?

As to the first point, a portion of the evidence which goes to establish it is the document Exhibit A, translated on page 59 of the record, which is in the following language:

(SEAL.)

"Seal fourth. One-fourth real.

"For the year eighteen hundred and forty and eighteen hundred and forty-one.

"In this second demarcation, San Miguel del Bado, on the second day of the month of July of the present year, eighteen hundred and forty-two, before me a citizen, Demasio Salazar, Justice of the Peace of said precinct, personally present appeared citizen Bentura Trujillo, citizen and resident of the first demarcation, soliciting the place and land commonly called the Ojito del Apache to establish in company with his children a farm on which he believed he will have the means necessary for the support of a large family, and to give tithes (illegible) and the holy church their corresponding portions, and I, said alcalde, finding the said petition to be a just one, and acting in conformity with the supreme decrees, have made him said donation in the name of God and the supreme Mexican nation, so that as a good patriot he will make use of it, observing the requirements which our laws provide, under the conditions and restriction that if he does not provide a protection to prevent the damages which may result to him, he is under obligation to bear them, it being commons and pasture grounds of the inhabitants of this precinct; and the boundaries corresponding to said grant are on the north the mesa; on the south the old road to Los Chupaines; on the east the

Mesa del los Chupaines; on the west the hills bordering on the Canoncito del Lagunita; and in order that this foregoing instrument may have the force and validity by law required, the aforesaid Trujillo requested me to interpose my authority as judicial decree, and I, the said justice, declared that I would interpose, and I did interpose so far as I am authorized by law. Those of my attendants signing with me, with whom I act by appointment, for the notorious lack of a notary public, there being none of any kind in this department. In form of law to all of which I certify.

(Signed) DAMASIO SALAZAR.

"Attending: RAFAEL ARAGON.

"Attending: SALVADOR GONZALES.

"And it is given on this ante-stamped, there being none of the proper stamp.

"SALAZAR."

Which said document is the act of juridical possession given by the alcalde to Ventura Trujillo when he was placed in possession. The original grant was returned by him to the Governor and placed in the archives, as will be seen by the evidence of Guadalupe Miranda, who was the Secretary of the Territory at the time. See page 102, where the evidence of Guadalupe Miranda is set out in full. Who testifies in November, 1873, that he was Secretary of the Territory of New Mexico during the time General Manuel Armijo was Governor. That he knew Ventura Trujillo at that time. That he lived at San Miguel del Bado, in the present County of San Miguel. That he remembers that about the year 1841 or 1842 said Trujillo petitioned Governor Armijo for a grant of land at the place known as Apache Spring; that he does not remember the boundaries, but is was near the grants made formerly to the Town of Anton Chico, to Juan Estevan Pino and to Antonio Ortiz, and to the Town of San Miguel del Bado. That the Governor granted the petition and issued a decree granting the lands prayed for to the petitioner, and directed the corresponding alcalde to place the petitioner in possession of the land granted, which decree he signed as Governor, and he, Miranda, signed the same with him as secretary. That the alcalde to whom it was referred, some time after-

ward, made his return that he had placed Trujillo in possession of the land in obedience to said decree and order, after which the original papers and the return of the alcalde were deposited in the archives of New Mexico and remained there under his charge as public records, he being custodian thereof by virtue of his office. That he does not know whether the said papers and records pertaining to said grant are in the archives of New Mexico, as he has been informed much of them had been lost and destroyed. That the papers were full and complete and the grant was perfect according to the laws of Mexico. By the evidence of Rafael Aragon said grant is also established. (See page 100.) He testified in substance, on the 31st day of October, 1873, before the Surveyor General, that he knew the tract of land known as Ojo del Apache, and gave its boundaries. That the grant was made to Ventura Trujillo and his children in the year 1841 by the Alcalde Demasio Salazar. That he wrote the granting document, and was at the time the secretary of the alcalde. That the grant was made under and in virtue of an order from the Governor, which was in writing and addressed to said Alcalde Salazar through Miranda, secretary of the Governor, and was in about this tenor, to-wit: "I am directed by his excellency, the Governor, to say to you that upon the receipt hereof you will proceed to the place called the Ojito del Apache, and will there place the petitioner Ventura Trujillo in possession of that land." That Salazar was addressed as alcalde of the second demarcation and the communication was deposited among the archives of the alcalde's office. The alcalde complied with the order by placing Trujillo in possession of the land and then reported to Secretary Miranda that the Governor's order had been executed. Salazar went upon the spot and placed Trujillo in possession and pointed out to him the boundaries. Trujillo went upon the land to occupy it, he thinks in July, 1842. That he occupied it four years, built a small house, constructed some small tanks and planted some ground, and was succeeded on the place by Juan Lucero, he by Jesus Casados, and he by John L. Taylor. That Manuel Armijo was Governor when the grant was made. That he, Aragon, had never held any office ex-

cept that of secretary to the alcalde. Exhibit "A," the paper of which the foregoing document signed by Salazar is a translation, was then shown to him, and he was asked if it contained any allusion to the order mentioned as given by Armijo, to which he replied: "I believe it contains none." He was then asked: "Why, in writing the grant paper Exhibit "A," did you not make some allusion therein to the order of the Governor?" To which he answered: "I presume it was omitted by mistake." He stated that when he wrote the paper the Governor's order had been turned into the alcalde's office. That Demasio Salazar was not an educated man, but quite a business man. That he could neither read nor write, could scarcely sign his name, and for that reason as alcalde he had to have a secretary.

Francisco Trujillo, a witness, sworn in the cause, page 83, et seq, also testified that his father, who was Ventura Trujillo, had brought a very rich woman from the Comanches, and after that the Mexican government made this grant to his father, and that there was an order signed by the government (governor) with a man to go and deliver the land to his father. That he knows the order was signed by Governor Armijo, and declared (directed) Damasio Salazar to go and deliver the land. That the land was delivered in the year 1842. That he was present when it was delivered by Salazar and Rafael Aragon, his secretary, and that a communication was signed stating that it had been delivered. On page 93 he states that he heard Salazar say, in respect to the order of the Governor, that the order was to deliver the land to his father, and then he says that Damasio Salazar sent a communication to General Armijo stating that the land had been delivered. That his father and Damasio Salazar both told him that it had been sent.

Encarnacion Lopez, a witness (page 76 et seq) testified that he was present when the property was delivered in 1842 to Ventura Trujillo by Damasio Salazar and Rafael Aragon, his secretary. That he saw Salazar, Aragon and Trujillo at the time. They were at his camp, and he was herding sheep at the Ojo del Apache. That it was stated at the time by those parties that Damasio Salazar delivered

the possession of the land by order of General Armijo to Damasio Salazar. That Aragon, Salazar and Trujillo, all of them, stated so.

Pascual Baca, a witness, stated that while he never saw the order of Governor Armijo, he knew it was made because everybody so stated that Ventura Trujillo so claimed when he first knew him; that he got the impression that Armijo had made the order for the grant, from Trujillo, and from what everybody said, and he saw him living there.

Claimant contends that this testimony establishes the fact that a grant was made, and became a part of the public archives of New Mexico, as stated in Miranda's testimony, he being the person who had charge of them at the time. That is stated positively and unequivocally by him. The only thing that Miranda, the Secretary of the Territory, is not positive about is the particulars or minutia of the grant or the boundaries, but that it was petitioned for and the grant made and the alcalde directed to give possession, and that the alcalde reported afterwards that the possession was given and that all the grant papers thereafter were placed in the archives, which were under his control, etc. He is positive and expresses no doubt about his recollection. The witness Rafael Aragon is also positive about what he remembers, and that is that the possession was given under and by virtue of an order coming from the Governor through Miranda, and that the possession was given, that he wrote the act of juridical possession himself, and that when he wrote it he neglected to refer to the order of the Governor, as he supposes, by mistake. We contend that there is no necessity of his referring to the order of the Governor. He reported back to the Governor, according to the testimony of Aragon, as to what he had done, and Miranda says he returned the act of juridical possession, which was filed in the archives with the grant papers. Aragon says that the order which came to Salazar through Miranda remained in the justices' archives. Both Aragon and Miranda were dead when this case was tried. Their testimony was taken in the year 1873, Aragon's before the

Surveyor General and Miranda's on a commission issued by the Surveyor General.

Francisco Trujillo, a son of the grantee, Ventura Trujillo, was present when the possession of the land was delivered. He says that the alcalde, his secretary, and his father, the grantee, all stated that the possession was given by order of the Governor. Encarnacion Lopez was also present, herding sheep at the place, and heard them make the same statement. Pascual Baca states that everybody so stated, that the land was given by order of the Governor. Besides, that the witnesses, Pascual Baca, Encarnacion Lopez, Jose Benito Martinez, Francisco Trujillo, Juan Bautista Lucero, all state that the land was always acknowledged and respected by every one as the property of Ventura Trujillo, his heirs and assigns.

Taking all this together, it is hardly possible to believe that there was not a grant made. Salazar would not probably have undertaken to make a grant on his own responsibility. The laws of Mexico were very plain, and were apparently well known. Governor Armijo, as history tells us, was a very arbitrary man. He was a dictator, it might be said. He was the entire government. He did not allow his subordinates to usurp authority, and they would never have dared to do it. The Supreme Court of the United States, in The United States vs. Arredondo, 6. Pet., 729, says:

"The public acts of public officers purporting to be exercised in an official capacity and by public authority are not to be presumed to be usurped, but a legitimate authority, previously given or subsequently ratified, which is equivalent, must be presumed."

This authority is also quoted on page 340 in the Castillero case, as contained in the opinion of Judge Hoffman, of the District Court of California. The discussion in 6 Peters is quite extensive, and is to the same effect.

The claimant does not contend that Damasio Salazar as justice of the peace or alcalde could have made this grant, but he was a public officer. He undertook to act, and if there was authority for the grant to be given to the grantee he was the proper officer to do it. In delivering the

possession of granted property in that jurisdiction, he being the alcalde, and being the only person who could deliver the possession juridically, to that extent he acted in the scope of his authority, and under the decision quoted from the Supreme Court, a legitimate authority, previously given or subsequently ratified, must be presumed; but we do not have to rely upon presumptions; we have the positive fact that the grant was made by Armijo, the proper authority, as shown by Miranda, Aragon, Francisco Trujillo, Encarnacion Lopez and Pascual Baca, and the fact that it was so reputed and recognized by every one as having been so granted, and as being the property of Ventura Trujillo, his heirs and assigns. But the land court, by a majority of three against two, rejected the claim and dismissed the petition. Speaking through Associate Justice Fuller, of that court, and after reciting portions of the evidence, he says:

"If these facts (meaning the facts set out by the evidence as given) stood alone and without any explanation or contradiction, possibly the court might feel constrained to confirm the grant as prayed for in the petition, but the petitioner has himself offered in evidence a paper marked 'Plaintiff's Exhibit A,' which he alleges is the certificate of the execution of the Governor's order by the Alcalde Salazar, and it becomes our duty on the threshold of this case to place a construction upon that paper."

The court then say through Justice Fuller, speaking of said exhibit "A": "It does not profess to be in terms anywhere throughout the paper the execution of the Governor's order, but the action of the Alcalde Salazar. On the contrary, its whole frame and structure indicates that it was an independent action taken by the alcalde himself. He recites that the petitioner was there present and made his petition for the land. He goes on then and declares that he had adjudged that the petitioner had meritorious grounds for making the application. He then declares that his finding on the petition was based upon meritorious grounds, and that he had granted him, by donation, the lands with the boundaries petitioned for, and he declares that he did this in obedience to the supreme decrees and the

laws of the land. He then declares, further, that he pointed out to the petitioner the boundaries of the grant which he made. He does not anywhere allege, nor can it be inferred from what he states, that he ever put the petitioner in juridical possession of the land according to the customs of the country, but as we construe it throughout the whole document, he is acting on his own motion, and he alone made the grant. Now against the evidence of this writing is the mere memory of the Secretary of the Territory, and, as stated before, without any note or memorandum at all, and that testimony was given thirty years after the alleged transaction, and the testimony of Aragon, in which he offers no explanation at all for the omission of the document which it is stated he had prepared, at the instance of Salazar, tending to show the execution of an order of possession, simply saying that the same was omitted by mistake. To such recollections as these the court is unable to give the construction asked for by the petitioner, upon the above named document which he presented."

It would appear from this that the court apparently found enough on which to confirm the grant if this act of juridical possession had made any reference to the fact that it was issued or made in conformity with the granting decree of the Governor. Two of the court out of five were of the opinion that there was sufficient out of which to make a confirmation, so that this decree of the land court is rendered by a majority of only one, and that majority of one, apparently rejecting the grant upon a single proposition, that the juridical possession made no allusion to the granting decree.

There is nothing in the law of 1824, or the regulations of 1828, which required the certificate of the act of juridical possession to refer in any manner to the granting decree.

The court will notice that there is an expression in this act of juridical possession which must refer to the granting decree, if it refers to anything, and that is, where the alcalde recites, "Acting in conformity with the supreme decrees," etc. What were the supreme decrees referred to? The decree of the Governor granting the land was one thing, and it also contained a provision or decree directing

the party to apply to the alcalde to place him in possession, or directly designating a certain alcalde who was directed to place him in possession, as the testimony shows. I take it that the decree in this case, instead of directing Trujillo to apply to the proper alcalde, it at once directed Damasio Salazar, the alcalde, to place Trujillo in possession, so that there were two decrees issued from the Governor, who was the supreme authority over this alcalde and all others; as before stated, he was the entire government of New Mexico, and was the supreme authority, and his decrees were the supreme decrees. The word supreme decrees can refer and must refer to the decrees made by the Governor making the grant and directing the Alcalde Salazar to give the possession. It cannot refer to the laws of Mexico with as much propriety as it can to the decrees of the Governor, because under the decree of the Governor the alcalde would have the right to do just what he did. Under the laws of Mexico he would have no such right unless the decree of the Governor granting the property intervened. It is not to be presumed that the officer has acted illegally or usurped authority, when it is possible for him to be acting within the scope of authority; that authority must be presumed, and when there is anything in his act which can be construed to sustain him, as acting within the scope of authority, that construction must be put upon it. The majority of the court, however, through Associate Justice Fuller, seems to dwell upon the fact, as the opinion says, that Trujillo petitioned the alcalde for the land. The alcalde says he solicited the place. If Trujillo had petitioned the Governor and the Governor directed him to go to Salazar, and in his decree directed Salazar to give the possession, he certainly would have applied to Salazar and solicited him to complete the grant. It was the universal custom in this territory for the Governor to deliver the grant to the grantee and tell him to whom to go. Sometimes the decree itself would tell him to apply to the proper alcalde; other times the decree would direct the alcalde by name; but in either event, the grantee always carried the decree to the alcalde and solicited him to give him the possession of the land. There is nothing in the

recital of this juridical possession inconsistent with that practice. It says that he was present personally soliciting the place. He was still a solicitant for the place until he was actually placed in possession of it. The customs which prevailed in this territory and in California had established the regulations for colonization of the territories of November 21, 1828, in section 3 thereof, provided:

"The political chief shall proceed immediately to obtain the necessary information as to whether or not the conditions required by said law of the 18th of August are found in the application, both as regards the land and the applicant. Either that this latter be attended to simply or that he be preferred, and shall at the same time hear the respective municipal authority as to whether any objection or not is found to the grant."

Evidently the Governor had directed Salazar, who was the chief municipal authority of that demarcation, to first ascertain those facts, and if he so found them to complete the grant by giving the possession. And Salazar says that he finds the petition just, or that it was based on meritorious grounds, as the courts say, he made the donation, in conformity with the supreme decree, so that the petitioner as a good compatriot might make use of it, observing the requirements which the laws provide, and certain other things stated. Is there anything inconsistent in the requirement of the third section of the regulations of 1828 and what Salazar did? It will be observed that Salazar makes use in his actual juridical possession of the word decrees when he speaks of authority under which he was acting, and he makes use of the word laws when he speaks of the duty of the grantee, so that the word decrees and the word laws could not be used in the same sense. Mexican laws were sometimes called decrees; the Governor's decree making a grant was never called a law, but always called a decree. The courts say, in their opinion, that Salazar does not allege, nor can it be inferred from what he states that he put the petitioner in possession, according to the custom of the country. There was no requirement of the regulations of 1828, which required him to make such statement in the act of juridical possession.

Section 8 of said regulations provides that a document shall be signed by the political chief, and it shall be issued to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provision of the laws, in virtue of which the possession shall be given.

When the juridical possession is construed and compared with the regulations before mentioned, it will be seen that Salazar evidently must have referred to the decree of the Governor when he referred to the *supreme decree*. But it makes little difference whether he referred to the supreme decree of the Governor, or any other supreme decree, or used an idle phrase; it is a fact notwithstanding, independent of any recital of Salazar's in his act of juridical possession, that the grant was actually made by the Governor. This is shown by overwhelming testimony, and it is not contradicted by a single witness or a single fact, except the assumption that Salazar did not refer to it, and therefore it did not exist, and the further assumption that it not being found in the archives, therefore it did not exist, and this brings us to the second proposition to be considered.

II.

Was this grant in the archives, and has it been lost? Miranda, the secretary, against whom there has never been a scintilla of suspicion of dishonesty or crookedness, not only says that the grant was made and signed by Armijo and himself, but says that the original papers and the return of the alcalde were duly deposited in the archives of New Mexico and remained therein under his charge as public records, he being at that time the legal custodian of said archives and records, by virtue of his office as secretary. There can be nothing plainer than this, that the grant was actually in the archives, under his charge, he being the custodian. There can be no uncertainty of memory. He does not hesitate or express a doubt as to that fact; besides, he is corroborated by Aragon, who says that the alcalde reported his doings and sent them to the Governor; also,

Francisco Trujillo states the same thing. There can be no doubt, as we contend, of the grant being in the archives, but the authorities seem to require claimant to go a little further and show a loss of the grant. It could not be expected that a person residing a hundred miles away from the capital in those days, and from the archives, could constantly keep his eye upon the papers in the archives affecting his title. He would not be expected to look after them until he should have some use for them; nor would he be the custodian of them: nor could he direct the manner of keeping of them or the care and attention which should be bestowed upon them. That duty belonged to an officer of the government, and under the arbitrary manner in which the Spanish and Mexican governments were conducted private individuals would be loth to pry into the business of those officers. All that can be said or required of the claimant is to give some probable reason for the absence of the documents of the archives.

On page 57 of the transcript it is stipulated that a portion of the Spanish and Mexican archives in this Territory of New Mexico were lost, sold or destroyed in the year 1870, containing grants and other papers. This claim was first presented to the Surveyor General for approval some time after the second of December, 1872, as will be seen by the record, page 104. In the stipulation on page 57 it was further stipulated that an index made by one Antonio B. Vigil completed in the year 1851, and entitled a general index of all the documents of the Governments of Spain and Mexico up to the year 1846, contained no mention of any grant of the Ojo del Apache; but it is expressly reserved in said stipulation by the claimant that while he admitted that the index contained no such mention, yet that he did not admit that it contained all the papers which were in the archives, and it was further admitted that that index did not contain any reference to the Cubero Grant, that is, the grant in which the case of The United States versus Chaves 159 U. S. 462, et seq. was founded, and which grant in that volume was sustained by this Court, although the papers were lost, or could not be found.

This point has been judicially determined by this Court

in the case of U. S. vs. Chaves, 159 U. S.., 463, in which this Court says:

"The claimants likewise proved, by quite a number of witnesses residents of the Territory of New Mexico, that about 1870 a considerable portion of the archives of that Territory, containing documents relating to Mexican grants, made to lands within that Territory, were lost; that these papers were deposited in the territorial library where some of the witnesses had seen them in 1868 and 1869; that they were sold as waste papers by the librarian Bond and were scattered through the country. Many of these were Spanish documents and pertained to grants of land. When the Governor of the Territory heard that there was complaint made by the people of this treatment of public archives, he made efforts to get them returned, but the evidence is clear that many of them were destroyed and lost. The claimants also called as a witness, William M. Tipton who had been employed for several years in the office of the Surveyor General of the Territory of New Mexico and had charge of the Spanish and Mexican archives. He testified that the books and records in that office purporting to contain the registry of land grants by the Spanish and Mexican governments, prior to the time the Government of the United States took charge are in a disconnected fragmentary form, and that one of the most important books containing a record of grants, made by the Spanish and Meican governments, is missing, and is supposed to have been stolen. He also stated that there was not in the Surveyor General's office any index of the dates, lists of original expedientes or warrants of title to Spanish and Mexican grants * * * In view of this large body of uncontradicted evidence we think that the court below was plainly right in finding that the claimants had satisfactorily sustained the allegations in their petition. Not only was their evidence of the existence of an original grant by the government of New Mexico and a loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisturbed possession and

enjoyment of this tract of land. The counsel for the government indeed contend that the Court of Private Land Claims and this court have no power to presume a grant upon proof of long continued possession only; that this power is confined to confirming grants lawfully and regularly derived from Spain and Mexico.

"It is scarcely for us to consider such a question, because as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the Governor of New Mexico, who under the laws then in force had authority to make the grant.

"However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as it was in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American Law that a grant will be presumed upon proof of an adverse exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumtio juris et de jure* wherever by possibility a right may be acquired in any manner known to the law."

This decision quoted is a judicial determination of the facts of the loss of a part of the archives containing land grants in New Mexico, the proof that the grant papers were in the archives is uncontradicted, and conclusively established by Guadalupe Miranda who is corroborated by the evidence of Rafael Aragon, Francisco Trujillo and Encarnacion Lopez, and this fact is not disputed by any evidence in this case. The stipulation in addition to the official adjudication thereof as aforesaid, is to the effect that the archives were lost in 1870, containing grants and other papers, and this court in the case cited, say: "Not only was there evidence of the existence of the original grant by the government of New Mexico and the loss of original records sufficient to justify the introduction of secondary evidence," etc.

Claimants therefore insist that they have proven the existence of the grant by uncontradicted evidence; that it was in the archives and by the evidence of Sidebottom,

record page 25, it is shown that the papers of the grant are missing from the archives, and the land court on page 27 say: "Mr. Catron as far as we are concerned we think you have shown that the paper in question is not in the files in this case. We understand it has been the duty of the Surveyor General for the last forty years to get these papers together. We understand that you seek to prove the absence, loss or destruction of the original grant made by the governor. We think you have laid a foundation for secondary evidence."

Thus it appears that the loss from the archives was established, and its existence having been positively proven by Miranda and others, and that it was filed in and was a part of the archives, under the charge of Miranda, we insist that there is no evidence or presumption on which the existence of the grant can be defeated or overcome.

III.

The third point in this case is like the one in the case of U. S. versus Chaves et sup. For more than twenty years the grantee and those holding and claiming under him, had actual, adverse, continuous, exclusive, open and notorious possession, claiming the same under the act of juridical possession and a grant made by the governor of New Mexico. The court will observe that in the case of U. S. vs. Chaves, 159 U. S., on page 464, the courts say: "It is the general rule of American Law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumtio juris et de jure* whenever by possibility a right may be acquired in any manner known to the law."

Claimant contends that not only is there a possibility that the grantee had acquired a right by a grant from the government, but there is positive proof that he had done so, and that although the act of juridical possession may not refer to the grant, yet it is shown that it was a possession given under the grant. The proofs that the alcalde, who gave the possession was a very ignorant man in regard to

education, and although he had a secretary to do his writing, it is likely he dictated to him the substance of the act of juridical possession. He was a man who was noted for his self importance and arbitrary character. History has given his character which will be found in Kendall's Expedition. He was the officer who arrested the members of that expedition at or near Anton Chico in 1841 and carried them to Santa Fe, and from there by order of Governor Armijo, to Mexico. There is nothing inconsistent as claimant insists, between the facts set out in the act of juridical possession and the fact that the governor made a grant and directed Salazar to inquire into the facts and to give the possession, as was required by the regulations of 1828. Those regulations required an investigation to be had, and permitted the grant to be made if the facts were found to justify. The proof is the grant was made and of itself that would presume every preliminary step to have it consummated, but Armijo could also just as well have made the grant and directed Salazar to make the necessary investigation as to the character of the land, whether it was fitted for the purposes asked for, and whether the party was a proper party to receive it, and if he found such to be the fact, that he would place him in possession and thereby consummate the grant. His action was reported back to the governor and the grant and his report were filed in the archives and there was no disapproval of his action as far as the evidence shows. In fact there was none.

In addition to the fact that the grant was actually made and juridical possession delivered, and the grantee entered into possession, himself and his family, and resided thereon, it is shown by a very great preponderance of the evidence that he and those who held under him continued to hold actual, notorious and continuous possession for more than twenty years thereafter.

Pasual Baca, a witness for claimant (p. 63 et seq.) says when asked in regard to Ventura Trujillo, in 1846.

"Q. Where was he living at that time? A. He was living at Ojo del Apache.

Q. When did you first see him at Ojo del Apache? A. In 1840.

Q. What was he doing there? A. He lived there. He had a little ranch in '40.

Q. What improvements had he there, if any? A. He had a little shanty and he had planted corn fields and a little garden; that is what he had.

Q. Had he any other property there; if so, what? A. Yes, he had furniture.

Q. Any animals? A. Yes, goats and horses and burros; I do not remember whether he had any cattle or not.

Q. Where was he, if you know, in the year 1842? A. He was there yet and afterwards.

Q. How long did he remain at Ojo del Apache? A. About ten or eleven years.

Q. After what date? A. 1840.

On page 66 the same witness testifies: "How long have you known this tract of land? A. I was born there and live there now.

Q. Do you live within the tract of land or close to it? A. I lived near it very many years, and I live near it now. I live nearly above.

Q. You said Ventura Trujillo occupied it for about ten or eleven years? A. Yes.

Q. How did he occupy it? A. Something like that; he lived there; he had his ranch as I have stated.

Q. What family, if you know, did he have with him? A. He had a family; sons, also women.

Q. Were there any other settlements in that vicinity? A. A little below there at Lagunita.

Q. During that time that Ventura Trujillo lived on this property, state whether anybody else, if you know, claimed to own or possess the property besides Ventura Trujillo, possessed under him, or any part of it? A. During the time Ventura Trujillo occupied it I did not hear of anybody claiming it.

Q. While Ventura Trujillo was occupying it, how was it respected and regarded by the people in that section of the country? A. They respected it as the juridical possession of Ventura Trujillo.

Q. How was it regarded as to it being owned by him? A. As having been granted to him by Governor Armijo.

Q. As having been granted by Armijo and Salazar? A. Yes, because he lived there.

Q. Did you have any intention of settling upon it? A. Yes, I had.

Q. What was the reason you did not settle on it? A. I respected it because it belonged to somebody else. I knew it belonged to somebody else.

Q. Did you know who it belonged to? A. To Ventura Trujillo."

On page 72, redirect examination:

"Q. When Bautista Lucero bought the grant from the heirs of Ventura Trujillo, what did he do with it? A. He sold it to Mr. Taylor.

Q. Between the time he bought it and when he sold it to Taylor, what did he do with it? A. He lived upon it. He built a house there.

Q. How did he occupy it and with what? A. He moved there with his family and enlarged the house built by Ventura Trujillo.

Q. What use did he make of it while he lived there? A. He lived there and planted the same pieces of land Trujillo had. He had goats and stock there.

Q. What did he do with his stock he had there? How did he manage them? A. I do not know.

Q. Did he keep them up or graze them out on the property? A. Yes, he pastured them on the property.

Q. To what limits did he pasture them? A. Within the property. It is very large.

Q. How close did he go out to the boundaries? A. I saw him all the time within the boundaries.

Q. Always in one or different places? A. On different points of the grant, or different sites and in every direction, on every side.

Q. How many animals did he have? A. I do not know.

Q. How long did he occupy the land, from the time he purchased it until he turned it over to Taylor? A. Nearly nine or ten years. Maybe a little less, I do not remember.

Q. When he sold to Taylor, what did Taylor do with the property? A. He sold it to Mr. Hays.

Q. Before he sold it to Hays what did he do? A. He lived on it.

Q. How long did he live on it, before he sold it to Hr. Hays? A. Nearly nine or ten years.

Q. What use did he make of it besides living on it? A. He had stock, he had wagons and oxen, he had a trail of wagons.

Q. During the time Juan Bautista Lucero lived on the property, and occupied it ,did any one else live on it and occupy it? A. He was a relative of his (evidently referring to Ventura Trujillo) Francisco and Pablo (referring to sons of Ventura Trujillo), was with him. He was also my uncle on my mother's side.

Q. Was there anybody else living on it and using it then? A. I do not know.

Q. During the time that Taylor occupied and lived on the property, did any one else besides Mr. Taylor occupy it? A. No. Those who lived on it left it.

Q. To what extent did Taylor occupy the property outside of the house where he lived? A. He had a great deal of stock.

Q. Where did he pasture his stock? A. He pastured where Solano lives now. He pastured where these Americans live now and he pastured towards the mesa and everywhere.

Q. Did he pasture all over the boundaries inside of the land or not? A. I have seen his stock in all the grant.

Q. After Taylor sold to Hays what did Hays do with the property; after he bought it? A. I saw a great deal of his stock and sheep, and I saw his horses and cattle and his furniture.

Q. When did his family first go there? A. Since he bought from Mr. Taylor. * * * *

Q. How has Mr. Hays occupied the property? A. That way as having bought it from Mr. Taylor.

Q. After Juan Bautista Lucero bought from Ventura Trujillo, how was the property regarded and respected as to ownership by the people generally? A. It was regard-

ed and respected as the property of Juan Bautista Lucero.

Q. After Lucero sold to Taylor, and Taylor went to occupy it, how was the title respected? A. With respect; a great deal more than as belonging to Mr. Taylor. Sometimes he would not allow us to water there.

Q. After Taylor sold it to Hays, how was it regarded and respected—the title? A. As of Mr. Hays."

Encarnacion Lopez, another witness for claimant, on page 77, testified:

"Q. After the property was delivered to Don Ventura Trujillo, what did Don Ventura Trujillo do with it? A. He lived on that place while I was herding his sheep.

Q. How long did he live there, if you know? A. I was with him five years and a little over.

Q. What did Ventura Trujillo have there on the property, if you know? A. He had his stock, horses, goats. He planted on that place.

Q. How many goats did he have? A. I do not know how many, but he had a large herd of goats; I do not know the number.

Q. How many horses did he have? A. He had quite a number; about fifteen or twenty. He was very fond of traveling.

Q. Had he any cows or cattle on that property. A. When I was there I did not see any cattle.

Q. Where did he pasture these goats and horses? A. Within the place

Q. How far out towards the boundaries? A. I do not know if his horses went outside of the boundaries or not.

Q. During the time that you were there and saw him occupy it, was there anybody else occupying or claiming any part of that property? A. No.

Q. Now, how was that property respected and regarded as to ownership by the people in that vicinity and neighborhood during that time that Ventura Trujillo was there and occupied it? A. It was respected as belonging to the deceased Ventura Trujillo.

Q. Who claimed to be the owner of the property? A. Nobody; I never heard of anybody else.

Q. Did Ventura Trujillo claim it? A. It was recognized as his.

Q. Did he claim it or not? A. Yes; he possessed it.

Q. When you left there, who was in possession of the property? A. He.

Q. Since you went away from there, have you seen that property? A. Yes; I went there afterwards.

Q. How soon afterwards was it that you went to the property the first time? A. I do not remember very well, but three or five or six years; something like that. (This witness testified on page 76, folio 99, that he had known the property since it was delivered to the deceased Ventura Trujillo in 1842.)

Q. When you went back to the property, who, if any one, was in possession of it? A. I did not go to the house. I do not know whether his children or nephews, but some one possessed it for a good deal of time afterwards.

Q. Do you know if anybody else after Ventura Trujillo succeeded to the possession of that property after Ventura Trujillo? A. After he died I knew the people who lived on it.

Q. Who was there after his death? A. Bautista Lucero and Crecencio Baca, deceased.

Q. Were you there while they were in possession of the property? A. I was there upon occasions at the house with them.

Q. What claim, if any, did they make to the property? A. They said that they had bought from the heirs, but I do not know.

Q. They claimed the property by purchase? A. Yes; they recognized it as belonging to them by purchase.

Q. Now what were they doing with the property when you were there? A. I saw them in possession. They were living on it, and they were planting there.

Q. Did they have any animals or stock? A. They had a few goats. I did not see any other kind of stock.

Q. Did you go around over the property when you were back that time? A. I went to Las Vegas, and on my return they had a house. (Pascual Baca, at the top of page

73, testified that Lucero enlarged the house built by Ventura Trujillo.)

Q. Did you stop in that house? A. Yes.

Q. You did not see what they had outside of the road at the house? A. They had planted there corn and beans and a garden and chili and onions, and also cantaloupes.

Q. Do you know how they occupied that portion of the property that was some distance from the house? A. They said they had bought from the heirs. I did not see that, but they said they had possession as coming from the heirs."

Jose Benito Martinez, another witness for claimants, on page 80 et seq, testified that he knew Juan Bautista Lucero and also the property in question.

"Q. When did you first know that property? A. In 1854.

Q. Who was in possession of it at that time, if any one, to your knowledge? A. To my knowledge, the wife of Ventura Trujillo, deceased.

Q. How was she occupying, if you know? A. She had it loaned to Juan Bautista Lucero and to my uncle, Crecencio Baca.

Q. Was she there, or were they there? A. The widow of Ventura Trujillo, Juan Lucero and Crecencio Baca were there.

Q. That was in 1854? A. In 1854 or 1855.

Q. How long did they stay on that property, if you know? A. About eight or nine years, perhaps.

Q. Did they occupy the property long after they acquired title to it? A. A man by the name of Lopez came to see the property by order of the woman.

Q. Where were these men living, Baca and Lucero, at this time? A. At the Apache Spring.

Q. While they were there did they occupy it eight or nine years as their property or as the property of the widow? A. In 1855 this Isidro Lopez went there to see some stock that they had there. I was then herding goats there with my uncle Crecencio, and a brother of mine was cutting timber in the Canoncita. Then this Isidro came and my uncle Crecencio told him that the boy was cutting

timber there. Then Isidro told me to go and tell my father not to cut timber there. I went at night and came back the next day, and I told him that my father said that the timber was already cut, and wanted to know what he should do with it. Isidro said, bring the timber and cut no more. That is the way I came to know that it belonged to that woman.

Q. Now where was the place that timber was cut—within or without the grant? A. It was within the grant.

Q. Who did they claim that grant belonged to at that time? A. To Ventura Trujillo, deceased.

Q. Was his widow living at that time? A. Yes.

Q. Where was she? A. She was at the house. I do not know whether at San Miguel or Tecolote.

Q. Who were these two people who were there in possession at the time? A. Cresencio, my uncle, and Juan Bautista Lucero.

Q. What was your uncle's other name? A. Crescencio Baca.

Q. Who was Isidro Lopez, the man you mentioned? A. He was son-in-law of Ventura Trujillo, deceased, and son of that woman.

Q. Did you ever see the property after that time? A. All the time from the year 1854 until now.

Q. Did Juan Bautista Lucero and Crecencio Baca at any time cultivate that property as their own, to your knowledge? A. They bought it in the year '65.

Q. In what year did they buy it? A. '65.

Q. Who did they buy it from? A. In the year '55.

Q. From whom did they buy it? A. They bought it from Juan Lopez, the son of that woman.

Q. After they bought it, how long did they remain in possession of it? A. About eight or nine years.

Q. How did they occupy it? A. My uncle Crecencio had a little store there.

Q. Did they live there? A. They had some planting done there and gardens and orchards.

Q. Did they or not live on it? A. They lived there, also their families.

Q. Had they any animals or live stock? A. No; they

did not have any stock. My uncle Crecencio had a few goats.

Q. Who succeeded them in possession of the property, if you know? A. John Taylor.

Q. How did he occupy the property? A. He bought it from Juan Bautista Lucero.

Q. How long did he occupy it, and in what manner did he use it—Mr. Taylor? A. He had a station there. He had wagons. He was using it as a station.

Q. Did he have any animals or live stock there? A. He had wagons and cattle and horses and oxen.

Q. Where did he pasture them? A. Within the same place.

Q. During the time that Juan Bautista Lucero and Crecencio Baca occupied the property, how was it regarded and respected by the people generally in that locality as to ownership. A. They were recognized and respected as the owners of the land.

Q. After Mr. Taylor bought it, and went into possession and occupied it, how was it regarded by the people in that locality? A. They respected the same way as belonging to Mr. Taylor."

Francisco Trujillo, another witness for claimant, on page 83 et seq, testified as follows:

"Q. Do you know where the Ojo del Apache is? A. Yes, I know it because we had a farm there.

Q. Where did your father reside at the time the grant was made to him? A. In San Miguel.

Q. Did he ever reside on the grant? A. Yes.

Q. How soon after Damasio Salazar delivered the grant did your father go there to live? A. We lived there about thirty years.

Q. From what time to what time did you live there? A. I do not know the time that we stayed there, because the Indians drove us away, but my brothers went there to the property. * * * * *

Q. When was it that your father lived on this grant? A. Prior to his death.

Q. How many years prior to his death? A. I have stated that about thirty years.

Q. How long before he died did he go to San Miguel to live? A. I have said that he lived there since he was born.

Q. When did he live on this property? A. He lived there in the year 1842.

Q. How many years after the year 1842 did he live there? A. We lived there since the grant was made. We transported ourselves immediately there.

Q. You mean to say that as soon as the grant was made you went to Ojo del Apache to live? A. Yes.

Q. How many years did you stay there after you went there? A. We stayed there about thirty years.

Q. How many years after this grant was made was it until your father died? A. About ten years.

Q. When your father died, who, if any one, was in possession of the grant? A. One of my brothers.

Q. What was his name? A. Isidro Lopez.

Q. In what manner did your father possess the property? How did he occupy it? A. He had mares, and he had a little farm, and he had goats, and he made a planting there also.

Q. At what point on the grant was this planting? A. Near the spring.

Q. The Apache Spring? A. Yes.

Q. Where were those lands that he was cultivating? A. A little below Apache Spring.

Q. How close to the spring? A. About 15 yards.

* * * (Page 87.)

Q. After your father's death, you say your brother remained in possession of the property? A. Yes.

Q. How long did he stay in possession of the property after your father's death? A. We remained there about three years.

Q. Were you with him? A. Yes.

Q. How did you and your brother occupy the property after your father's death. A. By farming it and fl e stock.

Q. How many animals had your father on this property from the time Salazar gave him possession of it to the

time of his death? A. He had about thirty horses, sixty goats and six cows.

Q. Where did he pasture these animals? A. From the Ojo del Apache toward the hills.

Q. In every direction? A. In every direction.

Q. How did he pasture them with reference to the boundaries of the grant? A. Within the boundaries.

Q. How close to the boundaries? A. The boundaries were very far from the place where he pastured.

Q. Did the animals go out at any time towards the boundaries? A. No, they were all shepherded.

Q. Did the shepherd drive them where he wanted to or in any particular place? A. He drove them wherever he wanted to.

Q. Do you know how this property was respected and regarded after Damasio Salazar gave possession of it to your father, as to whom it belonged, by the people generally? A. Yes.

Q. How was it respected, as the property of whom? A. After my father died it was the property of my brother.

Q. During your father's lifetime, as whose property? A. As my father's.

Q. What became of the property after you and your brother ceased to occupy it? A. We kept watching it, and we kept going there to live after it went to my brothers.

Q. What did you do with it finally? A. We again went to live there.

Q. How long did you live there that time? A. We lived there about fourteen years. (This evidently refers to the time about ten years of his father's residence and three years of his and his brother's.)

Q. Who succeeded you in the property, if any one? A. My brother Isidro, and then it was sold to Luis Sulzbacher.

Q. Did you know Juan Bautista Lucero? A. Yes.

Q. Did you know Crecencio Baca? A. Yes.

Q. State whether or not they ever occupied the property. A. Yes.

Q. From whom did they obtain possession of the

property? A. I think from a brother of ours. I think he had sold to them.

Q. How long did they occupy it? A. I do not know how long they occupied it. They lived there a long time.

Q. How did they occupy it? A. They had a farm and animals.

Q. At what particular place did they reside? A. At the spring itself. They had houses there near the spring.

Q. Did they or did they not reside there? A. Yes.

Q. Had they families? A. Yes."

May Hays, the claimant, also testified, page 94. "Q. How long have you known the property you are claiming? A. Twenty-five or thirty years. * * (Page 95.)

Q. Who occupied the property, if any one, when you first knew it? A. When I first knew it one Juan Bautista Lucero occupied it. * * * *

Q. Now when you first knew Juan Bautista Lucero as occupying this property, how was he occupying it, in what manner? A. He was cultivating and had a small body of stock.

Q. Do you know what claim, if any, he made in regard to the land? If so, what was it? A. He claimed it through the widow. He married the widow of Trujillo.

Q. Did he claim it as his own or hold it for some one else? A. He claimed it as his own property.

Q. The property that is within these boundaries which you mentioned? A. Yes.

Q. How long did he occupy it to your knowledge? A. He occupied it about five or six years.

Q. And who succeeded him in the occupation of it? A. Mr. John L. Taylor.

Q. How did Mr. Taylor occupy it. A. He occupied it by living on it and grazing stock. Grazed stock on it.

Q. To what extent did he graze stock on it? A. Well, pretty much all over. He had a herd of sheep. He had a lot of oxen and some stock cattle.

Q. What claim, if any, did he make to the property? A. He claimed the whole boundaries as I have mentioned as his property.

Q. How long did he remain in possession of it? A. I cannot recollect exactly. It was about ten years.

Q. Who succeeded Mr. Taylor in the possession of the property? A. I did.

Q. How long have you had possession of it? A. I had possession, as well as I can recollect, since '76. The latter part of '76 or the fore part of '77. I cannot recollect which year.

Q. How have you occupied it? A. By grazing stock and living on it.

Q. To what extent have you grazed stock on it? A. I have grazed my stock all over it.

Q. What claim, if any, do you make to the property, while you have had it in your possession, as to whether or not it is your property? A. I hold it as my property by purchase from Mr. Taylor, and claim just the same limits as he claimed.

Q. Did you purchase from Taylor? A. I purchased from Taylor and Luis Sulzbacher."

On cross-examination May Hays testified: "Q. Quite a number of people there claiming under the government? A. No, there are not many. Three or four families, or five families.

Q. Inside of the limits of this tract you have mentioned? A. Yes.

Q. Well, do they cultivate any? A. Yes, small spots.

Q. Have any stock? A. They have some little stock.

Q. Where does their stock graze? Just where your stock graze? A. Just as my stock graze.

Q. Are their ranches near the spring or further south? A. There is one party south and another southwest. There is two brothers, Americans, that live south of the spring.

Q. How far from your place? A. It is about a mile and a quarter or a half to their house.

Q. What are their names? A. Adlons.

Q. Any one else that lives there on the tract of land under the government? A. This man named Solano and two or three families, that I do not know their names.

Q. How far do they live from you? A. They live about two miles.

Q. Do they plant and have herds just like the others? A. They have herds and plant some little.

Q. Who else is living on the grant? A. A couple—three men named Montoyas.

Q. They are claiming under the government, too? They claim under—well, I can't say.

Q. But they do not claim under your property? A. No.

Q. How far are they from the spring? A. Two or three miles from the spring.

Q. Inside the grant? A. Inside the grant.

Q. Who else, if anybody? A. Two men and their families. But I do not recollect their names. They have only been there a year or so.

Q. They cultivate, do they? A. I see they have some land broke up this season. I do not know that they cultivate any. They broke up some land this season. I do not know if they planted it.

Q. How far are they from you? A. About three miles.

Q. Some of these parties have been living there for quite a number of years? A. Yes, those parties of Montoyas have been living there, I suppose, thirty or forty years.

Q. Living there before you went there? A. Yes.

Q. Some of these other people have been living there for some time, have they? A. Eight, ten or twelve years.

Q. None except the Montoyas have lived there more than twenty years? A. No."

This testimony shows a continuous possession in Ventura Trujillo for more than twenty years, without any interruption of possession at all, and it shows a continuous possession down to the present time by the grantee and his successors in title, by residing on the same, cultivating small parts of it and grazing their live stock thereon, except a few people during the last eight or twelve years, and three persons named Montoya, who, Mr. Hays says, he supposes have been there thirty or forty years. Mr. Hays says he has known the property for twenty-five or thirty years; that he purchased it in the latter part of '76 or the early

part of '77, and took possession of it then, and these three Montoyas were there then, so that the only proof of the length of time the Montoyas were there is from 1876 or '77 forward, as Hays does not say he knows when they entered, but only supposes they entered thirty or forty years ago, and he does not know under what title they claim. It does not appear that they dispute his title, but, on the contrary, all the evidence shows that every one in that vicinity and that neighborhood respected and regarded the title of the grantee and his heirs and assigns to the property, and as belonging to them. This in our judgment shows a complete, perfect, adverse and continuous possession for more than twenty years, uninterrupted by any one, not even a trespasser. As against this testimony the defendant introduced Pablo Lucero, page 29, et seq, who testified as follows:

"Q. How long have you known the Apache Spring? A. I know it since the year '40.

Q. Just state how you have known it? Whether or not you were ever at the spring, and how many times, and all about it. A. The first time I went there I was passing by; then I went to the spring to take possession of it, being asked to do so by a man named Rafael Salazar.

Q. Between the time you first knew the spring, did you go there at any time? A. I was not there except in passing by the spring, before I took possession.

Q. Did you pass by the spring once, or more than once, or how many times? A. I remember one or two times before that time. * * * * *

Q. What was the condition of the spring as to your knowledge from the year '40 till the time you took possession? Was there any house there? A. There was no house there.

Q. Was there any land cultivated or broken? A. No.

Q. Was there any one during that time living at the spring? A. No.

Q. When did you first hear of Ventura Trujillo? A. About the year '55, when I went to the place to take possession.

Q. Was Ventura Trujillo living there then? A. No.

Q. Do you know where Ventura Trujillo lived previous to that time? A. Yes.

Q. Where did he live? A. In San Miguel.

Q. Did he ever live at Apache Spring? A. No.

Q. Did you ever see Ventura Trujillo? A. No, I did not know him.

Q. I believe you said you took possession in 1855. A. Yes.

Q. Just state how you came to take possession and who were your associates? A. I went to the Ojo del Apache Spring in company with Rafael Salazar, in company with other people. I remember only a part of the names of the other people. One of them was Jose Maria Martinez, and myself and Rafael Salazar and Jose Martinez, also Jose Abad and Gabriel Valencia.

Q. Were there any improvements of any character at the spring? Any houses, or anything of that kind? A. No.

Q. Were there any ruins of houses, or anything of that character left by people living there? A. No.

Q. Have you ever seen anything of that kind in passing the spring, previous to that time? A. No.

Q. Had you ever heard that Ventura Trujillo had any interest there? A. I did not know it before the time that I went to the place.

Q. Was Juan Bautista Lucero one of those who was with you in that enterprise? A. No.

Q. Did Juan Lucero live at this spring at any time? A. No.

Q. What improvement did you make at that spring when you went there with the others? A. We threw—made a—dug the earth for a reservoir, and we made a little ditch, and we carried the ditch to a place where we could irrigate with the water from the ditch at a little valley.

Q. When did you first know of any claim that Ventura Trujillo had to this property? A. At the time that we went to take possession of the spring.

Q. Previous to the time that you and those others went to the spring how was the spring used? A. The water from it ran through an arroyo.

Q. How was it used? A. The water was only used by travelers. They took it from the arroyo.

Q. Was any one pasturing at that place? If so, who? A. I know by information that they used it; ranched there during the winter.

Q. Did you ever see any cattle pasturing there? A. No."

It will be observed that this witness was only there in 1840, and then again in the year 1855. His cross-examination brings out clearly that when he was there in 1840 he was hunting animals, and only went down to the spring, took some water and rode away, and in the year 1855 he was there about twenty days, and between 1840 and 1855 was not there at all. On cross-examination he testified:

"Q. Was that the first time when you ever passed by this property, in the year 1840? A. Yes.

Q. You were then seven years old? A. Yes.

Q. Where were you going? A. I was hunting up some animals.

Q. How long were you at the spring? A. I just went down in the spring and took some water and rode away with the animal.

Q. Then you say the next time was in 1855, when you went there to take possession? A. Yes.

Q. What time in the year 1855 was it that you went there to take possession? A. I am not certain about it. I am not positive, but I think it was in autumn, during the autumn.

Q. Was it as early as September, or before September, or after September? A. It was about September.

Q. Did you go there to take possession for yourself or somebody else when you went there in 1855? A. I was asked by another person.

Q. Who? A. Rafael Salazar.

Q. Where is Rafael Salazar now? A. He is in Colorado.

* * * * * *

Q. When did you first know Juan B. Lucero? A. I did not know him.

Q. Did you ever know Juan Xeponuceno Lopez? A. No.

Q. You say you never knew Ventura Trujillo. A. No.

This witness was sixty-three years old in 1896, and lived at Puertecito, nine miles from the Apache Spring, and in the vicinity of where those parties all lived, yet did not know any of them. He further testified:

Q. What did you do when you went to take possession of the spring in 1855? A. To dig a ditch from the spring to a little piece of land that was susceptible of irrigation.

* * *

Q. Your intention was to cultivate it, was it? A. Yes, the piece of land.

Q. How many more were with you? A. About thirteen of us.

Q. Was that piece of land enough for thirteen of you to live on? A. I do not think so.

Q. You did not stay there, then, very long, did you? A. No.

Q. How long did you stay? A. About twenty days.

Q. Then you all went away at the same time, did you? A. Yes.

Q. And then never returned there to occupy the land? A. Never; except a man named Crecencio Baca. I know this from information in 1859.

Q. Crecencio Baca remained there, did you say. A. No, he also went away.

Q. What did you say about Crecencio Baca about the year 1859? A. He built a shanty there and sold some liquor.

Q. Was there any one else there but Crecencio Baca at that time? A. I do not know.

Q. Was Juan B. Lucero there with him? A. I do not know.

Q. You do not know much that took place there, then, aften 1855, do you? A. Not personally, but I know from information about the possession of Crecencio Baca.

Q. I do not want your information; I only want your personal knowledge. You did not see Crecencio Baca there, then; you only heard that he was there? A. I did not see him.

Q. And you really do not know that he did go there, of your own personal knowledge? A. No."

The court will observe that one or more witnesses for the claimant testified that Crecencio Baca and Juan B. Lucero were at the springs in 1855. Lucero had bought from a son of the grantee, and one witness said that the widow had loaned the place to Lucero and Baca, and that Hays testifies that Lucero married the widow of the grantee, and one witness says that they were all three there, the widow, Lucero and Baca, as the successors of the grantee and his heirs. The widow being one of his heirs, and this was in 1855, as shown by all the testimony, the very year, in the fall of which this witness, Pablo Lucero, claims he went there to take possession for Rafael Salazar. This witness on cross-examination further testified:

"Q. Of your own personal knowledge, you do not know whether anybody was on this property between 1840 and 1855, do you, of your own personal knowledge, without what other people told you? A. Yes, I know.

Q. You said that you were not there during that time; how could you know it except by information? A. I passed, traveled by that place several times before the year 1855.

Q. You said awhile ago that you only went there in 1840, possibly one time before 1855, did not you? A. Yes, but I was one time there.

Q. That is all the time that you remember that you were there, is it; that you are positive of it, before 1855? A. Yes.

Q. Then between the time when you was there, that one time, and the summer of 1855, you do not know who was at the property, of your own knowledge? A. No.

On redirect examination by the United States Attorney he testified:

"Q. How many times did you pass there between 1840 and 1855? A. I remember one time.

Q. Do you remember any other time? A. I do not remember.

Q. What year was that you passed there? A. In the year 1840.

Q. How many times subsequent to the year 1840. A. I only remember passing by one time.

Q. What year was that? A. In the year 1840.

Q. You never passed there between 1840 and 1855. A. No."

Thus it will be seen that this witness, some time in 1840, whether in the early part, middle or latter part is not shown, passed this spring, obtained a drink of water and went on. That he did not pass by there nor was he there from that time until the fall of the year 1855. It will be remembered from the evidence that Ventura Trujillo occupied the property ten or eleven years (his son says he died about ten years after possession was given him by Salazar), and then he evidently went to San Miguel, where he died. His sons stayed in possession of the property thereafter three years, and were driven off by the Indians. That must have been some time in the year 1854 or 1855, as Francisco says they occupied it fourteen years. Five sons went to the place with the father. Francisco also says that when the Indians drove them off, that is, when they went away, they kept watch of it and kept going back, but he says they were away about one year, so that very likely, or very probably it was during that year that this witness, Pablo Lucero, with Rafael Salazar, may have gone there to take possession, but the witness tells that when they went there they learned that the property was claimed by Ventura Trujillo, deceased, and that they only did a small amount of work, remained about twenty days, and left never to return; except one of them, Crecencio Baca, who was afterwards there under license from the widow and in company with Juan B. Lucero, evidently there under the title. This evidence, if it shows anything, does not show any such adverse possession as would interrupt the statute of limitations. The parties went there at a time when the owners had probably been driven off by Indians, remained a few days only, learned that the property was claimed by the grantee and his heirs and then left. That certainly was a recognition of the claim of the grantee and his heirs and a respecting of their rights. Otherwise, why did they leave and leave their improvements? This witness shows a la-

mentable ignorance in regard to the interested parties. His evidence certainly proves nothing against the claim or continuous adverse possession.

Defendant also called another witness, Juan de Jesus Armijo, who testified:

"Q. When did you first know the Ojo del Apache? A. In the year 1840.

Q. How did you come to know it then? A. I was herding some sheep.

Q. Where were you herding sheep? A. At Ojo del Apache.

Q. How long did you herd sheep there? A. About one month.

Q. Was any one living there at that time? A. No, it was vacant. * * * * *

Q. State when you visited the spring subsequent to that time; if so, when? A. In the year 1852; about the year 1852.

Q. Was any one living at the spring then? A. No, I did not see any one.

Q. Would you have seen any one if they had been living there? A. Yes.

Q. Were there any houses at the spring at that time? A. I did not see any.

Q. Any corrals? A. I did not see any.

Q. Any acequias? A. I did not see any.

Q. Where did Ventura Trujillo live at that time? A. In San Miguel, a little below the place.

Q. Did he have his family living at Ojo del Apache at that time? A. No.

Q. Was he cultivating any land there at the spring? A. No.

Q. Did he have any cattle at that time? A. No.

Q. Did you ever know of Ventura Trujillo living at the Ojo del Apache? A. No.

Q. How was the spring used at that time, in 1853? A. I only saw animals coming down to that place.

Q. Whose animals were at the spring? A. Perhaps strayed animals.

Q. Were you ever at the spring between 1840 and 1852? A. No.

Q. What was the general reputation at that time as to who owned the property at this spring, if it was being owned by any one? A. In the year '62 the late Crecencio Baca was residing at that place. That was the first resident that I ever knew at that place.

Q. In 1852 was that regarded as belonging to any one, or as public property, or as what? A. No, at that time I did not see any habitation there."

On cross-examination he was asked: "Q. What was your occupation between the years 1840 and '1852? A. Farming.

Q. You were farming at Puertecito during that time, were you? A. Yes."

It has been shown that Puertecito was about fifteen miles from the property. The attention of the court is called to the testimony of this witness, where he replies to the questions, whether there was any house at the spring in 1852, or any corrals, or any acequias, to each of which he answers that he did not see any. While immediately following he answers positively that at that time Ventura Trujillo did not have his family at Ojo del Apache, nor was he cultivating any land there, nor had he any cattle there. The court will remember that Ventura Trujillo was living at the spring some time in 1840; probably after this witness and the last preceding one, Pablo Lucero, were there in that year, if they tell the truth. It is not shown what time of the year those two witnesses were there, nor what time in 1840 Ventura Trujillo was living there. All that they say as to that time may be true. They both testify that they did not see the place from 1840, the one until 1852 and the other until 1855. Ventura Trujillo only lived there for ten or eleven years after 1840. While the testimony of his son Francisco shows, he died ten years after possession was given him, it shows also that his heirs were occupying the property for three years, from 1852 to 1855, when his widow was living on the property with her new husband, one Juan Bautista Lucero, so that Trujillo must have died about the year 1852. He died in San Miguel, a distance of

about ten miles from this property, and this witness could well say in 1852 that Ventura Trujillo was not there with his family, and was not cultivating land there, and did not have cattle there, because, undoubtedly, he was not in existence, but as to his seeing houses, corrals and acequias, he does not say that they were not there, but only that he *did not see them.* This witness and the other one were both applicants for land on this property from the government within the last few years.

Another witness was produced by the defendant, Nicolas Apodasa. He testified, page 42, that he was sixty-two or three years of age.

"Q. Do you know the Ojo del Apache Spring? A. Yes.

Q. How long have you known it? A. I knew it in the year 1842.

Q. How did you come to know it in the year 1842? A. I was herder for my uncle.

Q. Do you know what part of 1842 you were there? A. Yes.

Q. What month? A. I remained May, June, July, August and September, herding there.

Q. You say you were herding your uncle's flock? A. Yes, some animals belonging to my uncle.

Q. Did you know Ventura Trujillo? A. Yes.

Q. When did you first know Ventura Trujillo? A. I had known him in San Miguel, and I also saw him at the Ojo del Apache in the year 1842.

Q. Just tell the court as to seeing him at the Ojo del Apache; how long he stayed, and anything connected with his coming there. A. He stayed there two or three days only.

Q. Do you remember when that was? A. About April or September. It was in that year.

Q. Do you remember the exact month? A. It was about April or May. In one of those two months.

Q. Did he come back to the spring while you were there? A. No, I never saw him again there.

Q. Who was there with him when he came at the time

you speak of? A. I understood that there was a son of his with him.

Q. What did they do at the spring? A. They made a kind of dam with some brush and rocks and then they came back.

Q. Did they cultivate any land there that you know of? A. No.

Q. While you were there, did Damasio Salazar come there with them or with any other one? A. No, I did not see them.

Q. Did Rafael Aragon come there? A. No, I did not see him."

The court's attention is called to these significant answers that he did not see Salazar or Aragon, just as was given by the preceding witness.

"Q. Did you know the Ojo del Apache after that time? A. Yes.

Q. Did Ventura Trujillo ever live there? A. No: never.

Q. Did any one live there? A. At that place, Ojo del Apache, there was no one living there that I saw; only Crecencio Baca, who had built a house.

Q. Who built the house? A. My uncle, Crecencio Baca.

Q. Was there any house there when you went there? A. No.

Q. Any cultivated land? A. No.

Q. Any corrals? A. No.

Q. When did Crecencio Baca go there? A. My uncle, Crecencio Baca, went there in September.

Q. Do you remember what year? A. In the year 1859.

Q. Between the year 1842 and the time Crecencio Baca built a house there, was the spring used for herding at all? A. The flocks used always to be watered there.

Q. Whose flocks? A. They belonged to the Casados people and to various others."

Here the court's attention is called to the testimony of Rafael Aragon, page 100 of the printed record, 135 of the manuscript record, in which he says, speaking of Ventura

Trujillo: "He was succeeded on the place by Juan Lucero, he by Jesus Casados, and he by John L. Taylor." This Casados is evidently the one referred to by the witness in his answer last above quoted.

"Q. Did Ventura Trujillo use this as a pasturing ground, to your knowledge? A. He never used it; he never had any animals."

This answer is contradicted by every witness for the claimant. The witness testifies on cross-examination, page 45, that he was herding goats, and to the question, "You moved about from place to place with them, just as they do now? A. Yes, grazing them.

Q. And wherever the night found you, you stopped? A. No, I went to Lagunita to sleep.

Q. Then you said you were at the Ojo del Apache Spring during the months of May, June, July and August and September, 1842. Were you not working any lands at Lagunita? A. I went with the goats because my uncle was at work on my land.

Q. Then you took the goats out in any direction you pleased from Lagunita, did you? A. Yes, where they would ask me.

Q. And come back at night and stay there all night? A. Yes, I would return home.

Q. And stay until the next morning? A. Yes.

Q. And after the year 1842, where did you live up to 1852? A. Between the year 1842 and 1852 I lived at Puertecito and Lagunita.

Q. You say you saw Ventura Trujillo at Ojo del Apache in 1842? A. Yes.

Q. He was there with his son, you say? A. Yes, I think it was a son of his. * * * *

Q. Where were you in the year 1843? A. At Ojo del Apache.

Q. Living at Ojo del Apache? A. No.

Q. How long were you at Ojo del Apache in 1843? A. I would go there to herd some days and would return to the house.

Q. How many days were you there in the year 1843? A. I do not remember, but went there many days.

Q. And from the year 1842 where were you? A. In 1842 I was in Lagunita.

Q. In 1844 where were you? A. I was at my house in Los Rincon.

Q. Where is Rincon? A. It is opposite Puertecito, on the opposite side of the river.

Q. And you stayed there until 1852, did you? A. I remained there. Yes, until the year 1852.

Q. From 1842 until 1852 you were at Rincon? A. Yes."

The attention of the court is called to the fact that there is no question but that Damasio Salazar delivered the possession of the property in question to Ventura Trujillo on July 2, 1842. Yet this witness says he did not see Salazar nor Aragon nor Ventura Trujillo in that month, nor the witness Encarnacion Lopez. But he shows plainly that some time in that year, either in May or in September, Ventura and his son did come there and make a dam, showing that they were laying claim to the property. This is a fact which cannot be disputed. This witness also shows that from 1842 to 1852 he was living at Rincon, a place somewhat distant from there, although he says that he was at the spring some days in 1843. He was then only about ten years of age, and his recollection could not be very vivid—certainly cannot be as clear and positive as persons who were there and saw Ventura Trujillo living there, constantly, such as his son Francisco and Encarnacion Lopez, who lived there with Ventura Trujillo for five years, working with him.

The next witness for the defense was Miguel Apodaca. He says he lived at Rincon de las Bacas, which is fifteen or twenty miles from the Ojo del Apache. That he first knew the Apache Spring in 1842. That he was there several times; went there hunting up animals, in the year 1842, and afterwards. That at the time he knew the spring nobody was there. But in 1842 he saw Ventura Trujillo at the house of Lorenzo Lucero. He had come from the Ojito del Apache. That Lorenzo Lucero asked him how he was getting along with his land at the Ojo del Apache, and Trujillo said he went to work at that land, at Ojo del

Apache, that was given him by Damasio Salazar, but was not successful in it because the water was not enough, and that the three dollars he had paid Damasio Salazar for that hijuela was worth more than the whole Ojo del Apache. (This three dollars was evidently the fees of the alcalde.) That when he was at the Ojo del Apache there were no houses there, no cultivated land, and no corrals. That anybody pastured their stock there; they were common pasture grounds; that he did not know who they were. On cross-examination he states that his residence was possibly fifteen or twenty miles from the Ojo del Apache in 1843, and shows that the people at that time did not travel about much, and were not acquainted with what people in other towns owned. That it was in the months of March and April that he was at Apache Spring, in 1842.

The court will notice that this was at least two months before Damasio Salazar gave the possession to Trujillo. The witness said when he was there, in 1842, he was looking for lost animals, and went by the place, but did not stop, and that the next time he was there was not until 1855. (See bottom of page 62.)

On page 53 he shows that the conversation he had or heard with Ventura Trujillo was at the house of Lorenzo Lucero, and that was in March or April, 1842, more than two months before the possession was given. The conversation as represented on that page as having been had in March or April, 1842, purports to have been one with Salazar; evidently this is a mistake in transcribing the notes of the stenographer as that refers to the conversation with Trujillo.

The witness on page 55 admits that he did know that Ventura Trujillo had land at the Ojo del Apache, and on page 56 he says between the time Ventura Trujillo went from the Ojo del Apache to the house of Lorenzo Trujillo, which was in March or April, 1842, until the time Crecencio Baca made improvements, he was not at the spring.

This witness, if he is to be believed, simply proves that before the possession was given by Salazar there were no houses at the spring, and that the first houses that he saw there were made by Crecencio Baca, who was really there

in 1855, although some of the witnesses say it was in 1859. It cannot be pretended that any of these witnesses for the defense had equal means of knowledge with the witnesses for the claimants. Two of them first saw the land or spring in 1840, and one of the two next saw it in 1852 and the other in 1855. The other two first saw it in the early part of 1842. One of them says that he herded sheep around about there in May, June, July, August and September, but he camped every night at Lagunita, and herded his sheep in every direction. He does not really say that he ever went directly to the spring. There can be no doubt but that possession was given to Trujillo in 1842, and that he then took possession of the land, made improvements and built a house and lived there with his wife and sons. Very likely he had a house in San Miguel, a distance of about ten miles from there, where he may have passed some part of his time, and where these witnesses have frequently seen him, especially in the winter season, but none of these witnesses, except one, was at the spring between 1842 and 1852, and that one was there only in the year 1843, and his answers are that he did not see any houses, corrals or acequias there. That proves nothing, as the witness does not show conclusively that he was so situated that he must necessarily have seen them if they were there. He was a boy, and while the custom of the country was to graze sheep indiscriminatley over the lands of every one, as well as over the public lands, they always respected the inclosures, improvements and waters at or near residences, and never went near them, so that there is no probability that these parties occupied the waters at the spring, or had a certain knowledge as to whether there were residences there or not. But assuming that they did, and that their evidence is positive on that subject, the weight of evidence is still in favor of the claimant.

Claimant has gone extensively into this evidence, so as to brief it for the benefit of the court and make it easier to be digested upon the consideration of the case, and submits that the evidence shows a strong case in favor of the claimant. First, that the grant was made by the Governor. Second, that it was placed in the archives and has been

lost therefrom, and that there is sufficient accounting for its loss, so as to give secondary evidence, as this court determined in the Chaves case. Third, that the claimant and his predecessor in title had the possession of this property without any interruption for more than twenty years, from July, 1842, and that he and those under whom he claimed have ever since 1842 had the uninterrupted continuous possession of the spring itself and the lands for over a mile around it, all of the time up to the present, except one time when the Indians drove them off about 1854 or 1855, and that they then kept watch of the same and went back to it as soon as possible. An interruption by hostile Indians, twelve or thirteen years after the possession commenced, cannot be held to break the running of the statutes, or to disturb the actual continuous possession. The Surveyor General in 1873, on a small amount of evidence only, and no proof of existence of the grant by the Governor, disapproved the claim. Afterwards he took new evidence, but would not open the case to change his decision, but reported the evidence to Congress for its action. In this state of the case the land department extended the public surveys over the property, or a portion of it, and settlers have come in on it. None are shown to have been there longer than twelve years prior to 1896; that is, earlier than 1884, which was forty-two years after juridical possession was given, except the Montoyas, who were about three miles from the spring, and who Hays, the claimant, says he supposes have been living there thirty or forty years, but does not know how they claimed. This certainly is not accurate enough to break the continuous occupation, especially when it is not shown that that occupation was of a hostile character, or anything more than a mere trespass. A trespass never breaks the running of the statute of limitation or interferes with the prescriptive right, unless the party sets up a claim of right himself, and there is nothing showing that these Montoyas set up any claim of right.

AUTHORITIES AND ARGUMENT.

The attorney for the government claims that there was no power in the Governor of New Mexico to make this grant. That the colonization law of 1824 and the regulations of November 21, 1828, were not then in force, that is, in 1842. This court has frequently decided and held that that law and those regulations were the only laws and regulations in force up to the time of the occupation of New Mexico and California by the United States authorities. That point needs no argument.

United States vs. Vigil, 13 Wall, 450: In this case the courts say:

> "It has been repeatedly decided by this court, the only laws enforced in the Territory of New Mexico for the disposition of public lands, with the exception of those relating to missions and towns, are the act of the Mexican Congress of 1824 and the regulations of 1838."

United States vs. Osio, 23 How., 275, et seq.
United States vs. Cambuston, 20 How., 60, et seq.
This last case was founded on a grant made in 1846.
See also United States vs. Reading, 18 How., 3, 7.
Hornsby vs. United States, 10 Wall., 236.

The last two cases also hold that notwithstanding the act of 1824, stated that no grant should be definitely valid until confirmed by the Departmental Assembly, yet that the Governors of the territory could make grants which would pass the title sufficient to call upon this government to confirm the same, as the grantee was in the condition to require a confirmation or recognition from the Mexican government when that government controlled the territory.

"The public acts of public officers purporting to be exercised in an official capacity and by public authority shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified."

This court in United States vs. Peralta, 19 How., 347, said:

> "This court had frequently so decided."

See United States vs. Arrendondo, 6 Peters, 728, 9 & 30.

United States vs. Castillero, 2 Black, 340.

Claimant insists that Damasio Salazar, as an alcalde of the demarcation where the land in question was situate, was the proper authority to give possession under a grant made by the Governor, in that demarcation; that he having so acted by so giving the grant, he being a public officer, and his act being a public act, the presumption is that he acted under proper authority conferred or subsequently ratified. This presumption fortifies the contention that a grant was made by the Governor. It even establishes that the grant was actually made. The authorities referred to say:

> "This court had frequently decided that the public acts of public officers purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped."

This court cannot presume that Salazar usurped his authority. On the contrary, it must be presumed that a legitimate authority had been previously given or subsequently ratified. Taking this presumption in connection with the facts in evidence, the court cannot but believe that the grant was made and Salazar directed to give the possession. That is the only authority he could have; besides, the claimant has proved by Miranda, the Secretary of the Territory, that the grant was actually made, and that Salazar was directed to give the possession under it, and that he did so, and so reported back to the Governor, and this is also corroborated by Rafael Aragon, Encarnacion Lopez and Pascual Baca. The absence of the grant from the archives, where Miranda testifies it was deposited, is sufficiently accounted for (United States vs. Chaves, 452) to

authorize secondary evidence, and that evidence is given.

The claimant in this case has brought himself and his predecessors in title easily within the rule that where there is no archive title, still the claimant may prove the execution of the grant, and if he proves possession under it, so as to show good faith, and the compliance bona fide with the intent of the grant and with the law, his grant will be good, although it had never been placed in the archives.

United States vs. De Haro, 22 How., 243. This case was founded on a grant, an original copy of which was produced, but was not found in the archives; the genuineness of the Governor's signature, however, was proven. The courts say on page 298: "It appears that an undisturbed possession of the property claimed has been in the possession of Francisco De Haro and his heirs sixteen years, and it does not appear that any one has claimed or exercised possession or right of possession over the premises. * * Upon the whole we cannot doubt, from the title papers, and especially from the sixteen years' possession which has been enjoyed by De Haro and his heirs—using the property as their own, claiming it under the grant—that the title should be confirmed."

In Peralta vs. United States, 3 Wall., 440, this court says, speaking of a grant which could not be found in the archives:

"But it may be said that the archives of the country may be lost or destroyed, and if so, that the party in interest should not suffer. This is true; and if the claimant can show to the satisfaction of the court that the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed, he will be permitted to introduce secondary evidence of it."

Also White vs. United States, 1 Wall., 680.
United States vs. Castro, 24 How., 349 and 350.
Pico vs. the United States, 2 Wall., 279.

The objection that the grant is not found mentioned in the Vigil index is not entitled to much weight.

United States vs. Auguisola, 1 Wall., 352.

This case refers to the Jinmeno Index in California, but there is no proof in this case that the Vigil index was made by any authority or that Vigil was an officer or an employe and authorized to make it, or that it was accurate. It purported to be made about 1851, before the establishment of the office of the Surveyor General in New Mexico, and about the time the present territorial organization took effect. It is not shown in any manner to be approximately correct. It only purports on its face to be an index of grants, but other grants have been shown not to be mentioned in it, particularly the grant of Juan Chaves, on which the case of United States vs. Chaves, 159 United States, 455, is based. This index has not been considered of sufficient importance to be alluded to more than once or twice in all the cases tried before the Land Court, although many of them were not mentioned in it.

III.

Adverse, exclusive and uninterrupted possession for twenty years, under the general rule of American law, will require a grant to be presumed. (United States vs. Chaves, 159 U. S., 464.) The courts say in this case: "It is scarcely necessary for us to consider such a question, because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the Governor of New Mexico, who, under the law then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as is displayed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied, as a *presumtio juris et de jure*, wherever by *possibility* a *right* may be *acquired in any manner* known to law."

It would seem to be unnecessary to cite authorities beyond this. In that case the grant was not produced from

the archives, nor was any copy of it from private hands. It was proven that the archives had been sold, and some of them containing grant papers lost, or not recovered, but the existence of the grant was proven, as in this case, but not by as strong evidence as in this.

Possession in this case has been proven to have been given on July 2, 1842. It is shown that the grantee had possession at the spring prior to that, but under the possession given by the alcalde, his boundaries were fixed and limits defined, and he was juridically given the possession. The proofs show beyond question that during that year he moved his family there with his children, or, at least, had them there. Of course, in July it was too late to make any crop for the year 1842, and not until the spring of 1843. All the witnesses for the claimant, except one who was only fifty-three years old, and the claimant himself, show that the grantee entered into possession and so continued until his death, although he died at San Miguel, a distance of ten miles from there. It is shown that he remained for ten or eleven years, and his sons remained there for three years more, which would take them up to 1854 or 1855, when they were driven off by the Indians. They say that they immediately returned. One of the identical sons so testifies; that is, that he kept watching the place and returning to it from time to time for about one year, and then returned to it. It is shown without doubt that one Bautista Lucero and Crecencio Baca occupied the property from 1855 for nine or ten years. Lucero married the widow of the grantee, and she lived there with him. Lucero, in his own testimony, says he stayed there four or five years. The testimony further shows that Crecencio Baca and Lucero were there by permission of the widow, and some of the witnesses say that Baca was there in 1859, and others in 1862. All of the witnesses for the claimant show that the property was occupied by Lucero and Baca in 1855, and that Baca continued to occupy it at least as late as 1862, and Lucero says that he occupied it until he sold it to Taylor. It is shown that Taylor occupied it until he sold to claimant Hays, and that Hays occupied it until the day of trial. All these parties, from the original grantee in 1842 down to Hays, the

claimant in 1896, actually lived on the property, claiming it as a grant to Ventura Trujillo, and by conveyances to them down to the present time. All the neighbors in that vicinity, and everybody in that neighborhood, as the testimony shows, regarded and respected the property as the property of Ventura Trujillo, granted to him by the Governor and alcalde, and as the property of his successors down to and including the claimant. There is nothing shown to overcome the positive evidence of the claimant as to possession, except some negative testimony, such as the parties did not *see* certain things, and by witnesses who were seldom there, and who were not there at any time after juridical possession was given earlier than 1852, and then only once or twice. Such testimony should not be allowed to overcome positive and direct testimony of persons who lived upon the property, who were there and saw the parties in possession, and who testified to continuous, uninterrupted possession, except during one year by hostile Indians, about twelve or thirteen years after the grant was made, and who show that they returned as soon as possible and retook possession. There can be no pretense that the Indians set up a hostile possession, or that their driving away the owners or occupants would legally interfere with the possession when it is shown that the parties returned within a reasonable time and retook possession and forever thereafter held it under the claim of the grant.

The case is respectfully submitted and confirmation of the grant asked of this court.

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